
In the Matter of the Compensation of
STEFAN SWIERCZEK, Claimant
WCB Case No. 08-06516, 08-06489, 08-01335, 07-01251
ORDER ON REVIEW
Bennett Hartman Morris & Kaplan, Claimant Attorneys
Maher & Tolleson LLC, Defense Attorneys
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

Claimant¹ requests review of those portions of Administrative Law Judge (ALJ) Otto's order that: (1) upheld Zurich American Insurance Company's (Zurich's) *de facto* denial of claimant's injury/occupational disease claims for bilateral shoulder and right wrist conditions; and (2) upheld Traveler's Insurance Group's (Traveler's) denial of claimant's injury/occupational disease claims for the same conditions. On review, the issues are compensability and, potentially, responsibility.

We adopt and affirm the ALJ's order, except for the portions addressing a potential claim preclusion issue, with the following supplementation.²

Like the ALJ, we find that the medical evidence does not establish that the decedent's right wrist condition is work related. (*See Exs. 170-172, 182, 199-7*). We also agree with the ALJ's conclusion that the medical evidence does not persuasively establish that the decedent sustained compensable right or left shoulder injuries, other than those previously accepted by Argonaut Insurance Company (on behalf of Cherry City) and the SAIF Corporation (also on behalf of Cherry City). (*See Exs. 128, 162*).

Claimant contends that the occupational disease claims for bilateral shoulder conditions are compensable under the "last injurious exposure rule" (LIER) rule of proof. She relies on Dr. Hanley's opinion, contending that it establishes that all contributing causes were work related. We disagree, reasoning as follows.

¹ Claimant, Zofia Swierczek, is the surviving spouse of Stefan Swierczek, the deceased worker. As such, she is the statutory beneficiary.

² In its respondent's brief, Zurich contests the ALJ's denial of its motion to dismiss, contending that claimant's claims are precluded by its March 2, 2007 denial of claimant's claim for a January 17, 2006 injury/occupational disease. (*See Exs. 169, 190, 200*). However, even if claimant's work activities on or about January 17, 2006 are fully considered, we are not persuaded that they were a material contributing cause of claimant's disability or need for treatment for his shoulders or his right wrist. Consequently, we do not reach the potential claim preclusion issue.

Under the LIER rule of proof, an occupational disease claim is compensable if work exposure at more than one employment is the major contributing cause of the condition. *Roseburg Forest Products v. Long*, 325 Or 305, 309 (1997); see *Kepford v. Weyerhaeuser Co.*, 11 Or App 363, 367, *rev den*, 300 Or 722 (1986) (occupational disease compensable because the worker's job injuries and employment conditions together were the major contributing cause of the condition).

Here, Dr. Hanley discussed numerous work incidents and work activities that he believed caused or contributed to the decedent's shoulder conditions. However, Dr. Hanley did not explain why or how he rejected or discounted nonwork related contributors identified by other physicians (including aging and the natural progression of degenerative disease). (See Exs. 213-2, 254-13-14, 255-1-2, 257-1-2, 258-1). Claimant argues that the decedent's shoulder degeneration was work related. However, Dr. Hanley's opinion does not persuasively support that relationship and the other physicians distinguished the decedent's degenerative conditions from the effects of his work. For these reasons, as well as those expressed by the ALJ, we find Dr. Hanley's opinion unpersuasive. Accordingly, because the persuasive medical evidence does not support a conclusion that the decedent's work activities (including his compensable injuries) were the major contributing cause of his shoulder conditions, we uphold the carriers' denials of such claims.

ORDER

The ALJ's order dated July 8, 2011, as corrected August 1, 2011, is affirmed.

Entered at Salem, Oregon on March 9, 2012